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NO. 84-1639

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FRANK B. HALL & CO. INC.,
FRANK B. HALL & CO. INC. OF TEXAS
AND FRANK B. HALL & CO.,
Petitioners,

v.

LARRY W. BUCK,
Respondent.

On Petition for a Writ of Certiorari to the Fourteenth Supreme Judicial District Court of Appeals of the State of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. In a defamation suit between a private plaintiff and a non-media defendant, where the plaintiff has proved actual malice, does the federal Constitution preclude the State of Texas from applying its common-law rule that truth is a defensive matter?

II. Where a State trial court has awarded punitive damages in a private defamation suit against a non-media defendant, does the federal Constitution require a State appellate court to make an independent review of all evidence relevant to actual malice?

III. Is evidence of ill will relevant to the issue of actual malice?

IV. Does the evidence support the jury's finding of actual malice?

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Texas court of appeals is reported at 678 S.W.2d 612, and is reprinted in the Appendix to the Petition for Certiorari, at A1-A34. Petitioners' subsequent application to the Supreme Court of Texas for a writ of error was refused without opinion, with the notation "No Reversible Error." (Appendix to Petition for Certiorari, at B1.)

JURISDICTION

Petitioners' writ of error was refused by the Supreme Court of Texas on December 12, 1984. That court overruled Petitioners' motion for rehearing on January 23, 1985, and the petition for certiorari was filed on April 17, 1985. Respondent received the petition on April 22, 1985.

Petitioners are invoking this Court's jurisdiction under 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

Respondent Larry W. Buck ("Buck") brought this suit against Petitioners Frank B. Hall & Co. Inc., Frank B. Hall & Co. Inc. of Texas and Frank B. Hall & Co. (collectively referred to as "Hall"). Hall is an insurance brokerage firm.

In 1976, Buck was an insurance salesman for Alexander & Alexander, an insurance brokerage firm that competes with Hall. Buck was the top salesman in Alexander & Alexander's Houston office, and was among Alexander & Alexander's top five salesmen nationally.

Hall hired Buck away from Alexander & Alexander. He began work on June 1, 1976 under a three-year employment contract. Several Alexander & Alexander employees followed Buck to Hall's office. During the next several months, Buck generated substantial commission income for Hall and brought several major accounts to the firm.

In March 1977, Buck was abruptly fired by Mendel Kaliff (the president of Hall's Texas operations) and Lester Eckert (a Hall vice-president in charge of its

Houston office manager, and a former Alexander & Alexander employee). Buck's termination had been orchestrated by Kaliff, Eckert and Virginia Hilley (another Hall vice-president and former Alexander & Alexander employee).

Subsequent to Buck's termination from Hall, several defamatory statements were made by Kaliff, Eckert and Hilley. As a result, Buck was unable to procure a similar sales position. His accounts stayed with Hall.

After a five-week trial in Texas state court, the jury returned a verdict for Buck on his claims for breach of contract and defamation. The jury specifically found, *inter alia,* that

- Hall and Buck entered an agreement on April 30, 1976
- Hall did not have good cause to discharge Buck
- Hall uttered seventeen defamatory statements concerning Buck
- Each of the defamatory statments was made with actual malice[1]
- None of the defamatory statements was substantially true
- Hall's defamatory statements damaged Buck in the amount of $605,000, of which $414,000 occurred prior to May 31, 1979
- Hall's breach of contract damaged Buck in the amount of $479,000 through the end of the contract term (May 31, 1979)

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1. The jury was instructed, "A statement is made with 'malice' if it is made with knowledge that it is false or with reckless disregard of whether it was false or not."

— Hall should pay $1,300,000 in exemplary damages

— The reasonable attorneys' fees for the breach-of-contract claim were $335,000.

The trial court then entered judgment against Hall for $670,000 actual damages,[2] $1,300,000 exemplary damages and $335,000 attorneys' fees.

Hall has raised a plethora of issues in the post-trial proceedings. Among those has been

— (a) the argument that the trial judge erroneously placed upon Hall the burden of proving the substantial truth of its defamatory statements. This issue was raised in the trial court, in Hall's appeal, and in Hall's petition for writ of error to the Supreme Court of Texas.

— (b) the argument that the appellate court should undertake an "independent review" of the evidence concerning actual malice. This issue was raised for the first time in Hall's motion for rehearing in the court of appeals.

— (c) the argument that evidence of ill will is irrelevant to the determination of actual malice. This issue was raised for the first time in Hall's motion for rehearing in the court of appeals.

— (d) the argument that an "independent review" would show that the evidence does not support the jury's finding of actual malice. As

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2. This amount was calculated by adding $479,000 (breach of contract) and $605,000 (defamation)—then subtracting $414,000 for the temporal overlap between the two.

stated above, the notion of "independent review" was raised for the first time in Hall's motion for rehearing in the court of appeals.

SUMMARY OF ARGUMENT

Respondent Buck submits that the writ should be denied:

I. Hall has failed to show that the ruling that truth is a defensive matter raises an issue worthy of review by this Court. Its assertion of a conflict of decisions is belied by a careful review of the cited cases. In any event, the state court's ruling was correct. Moreover, any error would have been harmless, because Buck's proof of actual malice established falsity "as a practical matter."

II. Hall has shown no conflict of decisions as to whether an "independent review" is required in non-media cases. Moreover, Hall did not raise this issue seasonably. Even though the Constitution does not require "independent review," this case has been subjected to intense review.

III. Again, Hall has shown no conflict of decisions as to whether evidence of ill will is relevant to the determination of actual malice. The ill will issue was not raised seasonably in the state courts and has not been preserved for review by this Court. In any event, evidence of ill will is clearly relevant.

IV. Hall's suggestion that an independent review would show the absence of actual malice is simply a restatement of its second issue, which was not raised seasonably. In addition, there is no conflict of decisions on this point. Finally, the record contains ample evidence of malice.

REASONS WHY THE WRIT SHOULD BE DENIED

I. "In a defamation suit between a private plaintiff and a non-media defendant, where the plaintiff has proved actual malice, does the federal Constitution preclude the State of Texas from applying its common-law rule that truth is a defensive matter?"

Hall has asked this Court to review the ruling that Hall had the burden of proving that its defamatory statements were substantially true. According to Hall, the First Amendment required the State of Texas to abandon its common-law rule that defamatory statements are presumptively false, and so truth is a defensive matter.

Buck submits that Supreme Court review of this issue is not warranted.

A. Hall has not shown a conflict of decisions.

As Hall acknowledges, this case "involves a private plaintiff and a non-media defendant." (Petition for Certiorari, at 10.) Plaintiff Buck is not a public figure or a public official, nor is Hall a media defendant. When Hall argues that this issue presents a conflict of decisions, however, it chooses to forget these fundamental differences.

Hall cites eleven decisions supposedly in conflict with the ruling in this case. (*Id.*, at 12-13.) Of those eleven decisions, ten involved media defendants. *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371 (6th Cir.), *cert. granted,* 454 U.S. 962, *cert. dismissed pursuant to Rule 53,* 454 U.S. 1130 (1981) (private plaintiff, television defendant); *Gomes v. Fried,* 186 Cal.Rptr. 605, 136 Cal.App.3d 924 (1982) (public plaintiff, news-

paper defendant); *Goodrich v. Waterbury Republican-American, Inc.*, 188 Conn. 107, 448 A.2d 1317 (1982) (public plaintiff, newspaper defendant); *Applestein v. Knight Newspapers, Inc.*, 337 So.2d 1005 (Fla. Dist. Ct.App. 1976) (private plaintiff assumed arguendo, newspaper defendant); *Pierce v. Pacific & Southern Co.*, 166 Ga.App. 113, 303 S.E.2d 316 (1983) (public plaintiff, television defendant); *Beamer v. Nishiki*, 66 Hawaii 572, 670 P.2d 1264 (1983) (public plaintiff, newspaper defendant); *Sivulich v. Howard Publications, Inc.*, 126 Ill. App.3d 129, 466 N.E.2d 1218 (1984) (private plaintiff assumed arguendo, newspaper defendant); *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982) (private plaintiff, newspaper defendant); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 397 N.Y.S.2d 943, 366 N.E.2d 1299, *cert. denied*, 434 U.S. 969 (1977) (public plaintiff, book publisher defendant); *Nevada Independent Broadcasting Corp. v. Allen*, 99 Nev. 404, 664 P.2d 337 (1983) (public plaintiff, television defendant).[3]

The eleventh case, *Jacron Sales Co., Inc. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976), is the only one involving a private plaintiff and a non-media defendant. But in that decision, the Maryland Court rested its ruling on *state law* rather than the federal Constitution. *Id.* at 695.

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3. Only four of these cases involved private plaintiffs. Of those four, three involve summary judgment motions—and so the question was whether there were triable disputes of fact, not which party had the burden of resolving those disputes. Applestein v. Knight Newspapers, Inc.; Sivulich v. Howard Publications, Inc.; McCall v. Courier-Journal & Louisville Times Co.

The fourth private-plaintiff case, Wilson v. Scripps-Howard Broadcasting Co., is a questionable decision. *See* 454 U.S. 962 (granting certiorari). In any event, it is inapposite because (a) it involves a media defendant and (b) there was no finding of actual malice.

Hall has not cited *any* holding that—in a defamation suit between a private plaintiff and a non-media defendant —the Constitution requires a State to impose upon the plaintiff the burden of affirmatively proving the falsity of defamatory statements.

B. The burden was properly placed on the defendant.

According to Hall, this Court's recent decisions have jettisoned the common-law rule that "truth is a defense" in private defamation actions. The Texas court of appeals explained why Hall is wrong:

> [T]he decisions of the United States Supreme Court in the mid 1970's do not compel the change in Texas law argued by appellant Hall. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Supreme Court specifically held that the First Amendment to the Constitution does not permit the imposition of liability without fault on a publisher or broadcaster of defamatory falsehoods injurious to a private individual. Aside from this restriction, the Court said the states may define for themselves the appropriate standard of liability. 418 U.S. at 346-47. . . . In fact the year after *Gertz* was decided the United States Supreme Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) declined even to state whether the Constitution required that truth be recognized as a defense in a defamation action brought by a private person. The Court stated:
>
> > It is true that in defamation actions, where the protected interest is personal reputation, the prevailing view is that truth is a defense; . . .
> >
> > The Court has nevertheless carefully left open the question whether the First and Fourteenth Amendments require that truth be recognized as a de-

> fense in a defamation action brought by a private person as distinguished from a public official or public figure.

420 U.S. 489-90. In our opinion *Gertz* does not imply that the Constitution places on private defamation plaintiffs the burden of proving falsity. We believe that another decision by the United States Supreme Court, in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), supports our conclusion in this regard. In *Firestone*, a Florida state trial court had placed the burden on the defendant to prove that a newspaper report about a non-public plaintiff was true. Under Florida law the only findings required for determination of liability were (1) whether the article was defamatory, (2) whether it was true, and (3) whether the defamation caused the plaintiff harm. The Supreme Court held that with respect to liability for defamation of a private plaintiff, these three findings would have been sufficient to impose liability if there had been some finding of fault on the part of the defendant. The Supreme Court vacated and remanded the case, not because the burden of proving truth had been placed on the defendant, but because there had been no finding of fault on the part of the defendant within the meaning of *Gertz*.

> Under the decisions of the Supreme Court in *Gertz*, *Cox Broadcasting* and *Firestone* a private defamation plaintiff satisfies the Constitution by proving fault. In this case Buck, the appellee, has satisfied the Constitution's requirements by proving malice as defined *New York Times v. Sullivan* [, 376 U.S. 254 (1964)].

(Petition for Certiorari, at A21-A23.)

Hall was given ample opportunity to prove that its defamatory statements were true. It was thus given its due under Texas common law. This Court's recent decisions are not to the contrary.

C. In this case, any error in allocating the burden of proof would be harmless.

Both as a matter of logic and as a matter of the record evidence in this case, falsity has been established in this case.

In arguing that the logic of *Gertz* impliedly placed the burden of proving falsity upon a defamation plaintiff, Hall referred the Texas courts to Comment j to § 580B of the Restatement (Second) of Torts:

> The burden of proof of showing fault is undoubtedly upon the plaintiff. If the plaintiff has the burden of showing that the defendant was negligent in failing to ascertain the falsity or the defamatory character of the statement or that he acted recklessly or knowingly in this record, there remains little, if any, significance in the common law position that truth of the statement is a defense to be raised by the defendant and on which he has the burden of proof. (See § 581A). As a practical matter, in order to meet the constitutional obligation of showing defendant's fault as to truth or falsity the plaintiff will necessarily find that he must show the falsity of the defamatory communication.

(*Quoted in* Brief for Appellants, at 60; *cited in* Petitioners' Application for Writ of Error, at 67.)[4] In discussing the plaintiff's burden of showing *fault,* the editors thus point out that "as a practical matter," a showing of fault neces-

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4. Hall stresses the (inapposite) decision in Wilson v. Scripps-Howard Broadcasting Co., 642 F.2d 371 (6th Cir. 1981). According to the Sixth Circuit, it removed the burden from a media defendant because "a rule that places the burden of proving truth on the defendant permits the imposition of liability without fault in certain situations." *Id.* at 375. That is, the court was really concerned lest there be liability without *fault.*

sarily encompasses a showing of falsity.[5] Because Buck did establish falsity "as a practical matter" when he established fault, any error as to the burden on the specific issue of truth or falsity would be harmless.[6]

The evidence in this case confirms this logic. On the record, there can be no serious doubt that the defamatory statements were false.

In effect, review by this Court would merely produce an advisory opinion. If the Court is interested in the issue, it should await a case where the issue is more clearly presented and where the issue was essential to the judgment below.

II. "Where a State court has awarded punitive damages in a private defamation suit against a non-media defendant, does the federal Constitution require a State appellate court to make an independent review of all evidence relevant to actual malice?"

The jury found that Hall acted with actual malice. Groping for support from this Court's decision in *Bose Corp. v. Consumers Union of United States, Inc.*, ____ U.S.____, 104 S.Ct. 1949 (1984), Hall now argues that the Texas court of appeals should have extended its "independent review" of the evidence on actual malice.

5. The Restatement actually refuses to state any opinion as to which party has the burden of proof of the issue of truth and falsity. Restatement (Second) of Torts, Caveat to § 613 at 307; *Id.*, Comment b to § 581A at 235-36. The editors do point out, however, "It has been consistently held that truth is an affirmative defense which must be raised by the defendant and on which he has the burden of proof." *Id.*

6. Indeed, Buck proved actual malice, which is the most stringent variant of fault.

For several reasons, this issue is not appropriate for review.

A. There is no conflict of decisions.

In its brief discussion on this point (Petition for Certiorari, 19-21), Hall does not even attempt to show a conflict between this case and others. It cites no decisions from other States or from lower federal courts, and it acknowledges that "this Court has not addressed the issue of whether an independent review must be conducted in this type of situation." (*Id.* at 21.)

B. This issue was not seasonably raised in the state courts.

Hall did not even *ask* the State court of appeals to undertake any constitutionally required "independent review" of this case; instead, it simply pursued the traditional Texas "no evidence" and "insufficient evidence" issues. Only *after* the appellate decision had been rendered—in the motion for rehearing—did Hall first refer to any notion of independent review. Under established principles, that was too late. *See, e.g., Radio Station WOW v. Johnson,* 326 U.S. 120, 128 (1945) ("Questions first presented to the highest State court on a petition for rehearing come too late for consideration here, unless the State court exerted its jurisdiction in such a way that the case could have been brought here had the questions been raised prior to the original disposition.").

C. The Constitution does not require independent review in this case.

In *Bose,* this Court reaffirmed the role of independent review "in proper cases"—i.e., where the "line must be

drawn" between speech unconditionally guaranteed and speech which may be regulated. 104 S.Ct. at 1963-64, quoting *New York Times v. Sullivan,* 376 U.S. at 285.

This is not one of those "proper cases" for independent review. It involves neither a public plaintiff nor a media defendant. Even if it did, its facts do not place it on the cutting edge between protected and unprotected speech, where independent review might be appropriate.

D. This case has been subjected to intense review.

Respondent Buck would emphasize the thorough judicial scrutiny to which the extensive record in this case has actually been subjected.

After a five-week jury trial, the trial court thoughtfully considered several post-trial motions. Hall's motion for new trial, for example, did cause the judge to consider whether the jury's findings were based on sufficient evidence, in light of the entire record. *Burnett v. Motyka,* 610 S.W. 2d 735 (Tex. 1980); *Fisher Construction Co. v. Riggs,* 325 S.W.2d 126 (Tex. 1959). The record was then scrutinized under the same standard by the court of appeals, *id.*, after which the state supreme court denied Hall's writ of error with the notation "no reversible error." The extensive post-trial procedures have taken almost three-and-a-half years.

Hall simply disagrees with the jury's findings, and the acceptance of these findings by three reviewing courts. There is no legitimate basis for doubting the adequacy of appellate review.

III. "Is evidence of ill will relevant to the issue of actual malice?"

Hall asks this Court to hold that "ill will evidence is irrelevant" to the issue of actual malice. (Petition for Certiorari, at 23.)

Like the others raised by Hall, this issue is not appropriate for review by this Court.

A. There is no conflict of decisions.

Hall cites three cases supposedly in conflict with the view that ill will is relevant to the issue of actual malice. *Fogus v. Capital Cities Media, Inc.*, 111 Ill.App.3d 1060, 444 N.E.2d 1100 (1982); *Rose v. Koch*, 278 Minn. 235, 154 N.W.2d 409 (1967); *Burke v. Diener*, 97 N.J. 465, 479 A.2d 393 (1984). (*See* Petition for Certiorari, at 22.) But there is no real conflict.

In *Fogus*, a lower court in Illinois did state broadly that "bias, ill will, or even hatred of a public official is irrelevant." 444 N.E.2d at 1103. But that court was addressing "a mere grudge," and immediately went on to "emphasize that under some facts, the difference between a mere grudge and an effort to act maliciously might involve a subtle nuance in the evidence"; the court then acknowledged that "proving actual subjective malice is a complicated task." *Id.* In any event, the entire passage is dictum, for the court expressly stated that "we need only decide the threshold issue of whether the allegations are sufficient to state a cause of action." *Id.*[7]

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7. Indeed, the court held that it was sufficient to allege that the defendants made statements "in retaliation for certain drug arrests made by the plaintiff." 444 N.E.2d at 1104.

In *Rose*, the Minnesota court rejects, without discussion, an instruction that in an actual malice determination, a jury "could consider evidence of personal ill will, the exaggerated language of the libelous document, the extent of its publication, or *any other factors that the jury might regard as equally relevant.*" 154 N.W.2d at 421 (emphasis added); *id.* at n. 26. At best, it is not clear what portion of the instruction was deemed objectionable. The probable source of the court's concern was the open-ended final clause. The ambiguity of the court's opinion severly undermines Hall's assertion of a true conflict.

In *Burke*, the New Jersey court contrasted actual malice with common-law malice, 479 A.2d at 399, then ruled that actual malice did not exist where the plaintiff's own evidence belied the notion that the defendants entertained serious doubts that their statements were true. *Id.* at 401. Though one sentence states that "the jury is not to look for evidence of spite or ill will to judge the actor's speech," *id.* at 399, that notion is not only overstatement but also dictum.

B. This issue was not seasonably raised in the state courts.

At trial, Hall made no objection to any evidence of ill will. Afterwards, on appeal, Hall took the (uncontroverted) position that evidence of ill will *alone* is not sufficient to establish actual malice. For example, Hall stated to the court of appeals,

> Decisions of the United States Supreme Court have made it clear that ill will alone is *never* sufficient to establish *New York Times* malice. . . .

> While evidence of ill will may be probative on the issue of *New York Times* malice, it can never be dispositive of that issue. . . .

(Reply Brief for Appellants, at 24-25.) The court of appeals accepted this proposition:

> While evidence of ill will alone is not enough to establish malice, proof that the defendant entertained ill will toward the plaintiff is probative evidence that the defendant published the information either knowing of its falsity or with reckless disregard for its truth or falsity. *See Stearns v. McManis*, 543 S.W.2d 649 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ dism'd). Thus, when coupled with other evidence, proof of ill will may furnish a sufficient basis for a jury's finding of malice.

(Petition for Certiorari, at A11.)

In its motion for rehearing in the state appellate court, however, Hall abandoned its prior position that evidence of ill will alone cannot establish actual malice. Instead, Hall stated,

> Assignment 41.
>
> The Court of Appeals erred in holding that malice on the part of Hall's employees could be established by proof of ill will, coupled with other evidence.

(Motion for Rehearing for Appellants, at 36.) Hall thus began the shift to its present position that ill will is irrelevant.

Having failed to raise this new position seasonably, Hall is in no position to pursue it before this Court. *See, e.g., Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945).

C. Evidence of ill will is relevant to the issue of actual malice.

On the merits, Hall's present position does not raise a substantial question for this Court. The notion that ill will is relevant to actual malice is inconsistent with common sense and with sound legal principles. Evidence of a speaker's ill will obviously bears upon the existence of "either deliberate falsification or reckless publication 'despite the publisher's awareness of probable falsity'." *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968), *citing Curtis Publishing Co. v. Butts,* 388 U.S. 130, 153 (1967).

To be sure, ill will *alone* may not equate with actual malice. But that is far different from saying ill will is logically irrelevant. *See* Restatement (Second) of Torts § 580A, Comment d (1977) (Ill will does not "in itself" constitute actual malice, but it can "assist in the drawing of an inference that the publisher knew that his statement was false or acted in reckless disregard of its falsity."). Evidence of ill will shows that the speaker had a motive to lie about his victim. Though it may be neither necessary nor sufficient for a finding of actual malice, it certainly is relevant to the inquiry.[8]

IV. "Does the evidence support the jury's finding of actual malice?"

Hall states that an "independent review" will show that there was not enough evidence to support the jury's finding.

This issue, too, is not appropriate for review.

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8. Consider an analogy from criminal law: A criminal defendant's ill will toward a murder victim is not sufficient *in itself* to show that the defendant committed the murder. But surely it is relevant.

A. This is a restatement of another non-reviewable issue.

Though Hall states this as a separate issue (Petition for Certiorari, at 23-24), it is essentially a restatement of Hall's request for an "independent review." As discussed above, the issue of independent review was not raised seasonably in the Texas courts.

B. There is no conflict of decisions.

Any review of the voluminous record in this case turns solely on the particular facts involved. Consequently, it is meaningless to assert a conflict with decisions in other cases.

Hall does cite three cases that supposedly hold that motive is not relevant to issues of actual malice. *Fink v. Combined Communications Corp.*, 579 P.2d 1108 (Colo. Ct. App. 1984); *Burke v. Diener*, 190 N.J. Super. 382, 463 A.2d 963 (App. Div. 1983), *reversed*, 97 N.J. 465, 479 A.2d 393 (1984); *Williams v. Trust Co. of Georgia*, 140 Ga. App. 49, 230 S.E.2d 45 (1976). (*See* Petition for Certiorari, at 23.) None of these decisions is by a state court of last resort. Moreover, rather than hold that motive is irrelevant, they simply apply the (uncontroverted) rule that evidence of ill will is not in itself sufficient to establish malice.[9]

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9. Hall suggests that under this Court's *Bose* decision, it is irrelevant that the speakers of defamatory material do not tell the truth in court. (Petition for Certiorari, at 23-24.) At most, however, *Bose* held that under the facts of that case, the speaker's in-court "rationalization" did not establish in itself the presence of actual malice. 104 S.Ct. at 1966. Clearly, obstinate refusal to acknowledge the truth is relevant. *See, e.g.*, Golden Bear Distributing Systems of Texas, Inc. v. Chase Revel, Inc., 708 F.2d 944, 950 (5th Cir. 1983), *quoting* Restatement (Second) of Torts § 580A Comment d (1977) (refusal to retract might be relevant in showing recklessness at the time of publication).

C. There is sufficient evidence of malice.

The record is voluminous, and the evidence has been briefed extensively in the state courts. There should be no question as to the adequacy of the evidence of actual malice. Indeed, the court of appeals' opinion merely touches the tip of the evidentiary iceberg—which is understandable, given that there were seventeen different instances of defamation. In general, however, the evidence showed (1) most importantly, the speakers knew the truth as a matter of personal knowledge,[10] (2) they did not tell the truth, either at the time or in court, (3) they told different stories to different people, (4) they had substantial economic incentives to prevent Buck from taking his accounts elsewhere, (5) their personal ill will toward Buck provided a motive to lie about him, and (6) treatment of Buck provided a motive to lie about his performance at Hall. Other than actual admissions of knowing falsity or reckless disregard, there is little other evidence of actual malice that the record *could* contain. *See United*

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10. Language from *St. Amant* is instructive:

> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story *is fabricated by the defendant, is the product of his imagination,* or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are *so inherently improbable that only a reckless man would have put them in circulation.* Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

390 U.S. at 732 (emphasis added). Note that unlike most media defendants, Hall is in no position to argue that it innocently relied on seemingly reliable information.

States v. Johnston, 268 U.S. 220, 227 (1925) "We do not grant a certiorari to review evidence and discuss specific facts.").

A NOTE ON THE DISPOSITION OF THIS PETITION

Hall points out that this Court has granted certiorari in *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.,* 143 Vt. 66, 461 A.2d 414, *cert. granted,* ____U.S.____, 104 S.Ct. 389 (1983). (*See* Petition for Certiorari, at 11.) The issues in *Greenmoss* are (a) whether the *Gertz* rules—*i.e.,* that in the absence of actual malice, neither presumed actual damages nor punitive damages may be awarded—apply to defamation suits against non-media defendants, and (b) whether those rules apply where the speech is of a commercial or economic nature. 53 U.S.L.W. 3045.

Buck submits that *Greenmoss* provides no reason to defer disposition of the instant petition. Even if the *Gertz* rules applied to this type of situation, that would not affect this case because actual malice has actually been proved.[11]

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11. Significantly, falsity "has never been disputed" in *Greenmoss.* 461 A.2d at 415.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that three true and correct copies of the aforegoing Respondent's Brief in Opposition have been served on all parties required to be served by serving opposing counsel, Irving C. Stern, 1980 Post Oak Boulevard, Suite 1600, Houston, Texas 77056, by certified first class United States mail, postage prepaid, return receipt requested, all in accordance with Rule 28.3, on the _____ day of May, 1985.

STEPHEN D. SUSMAN